Supreme Court, U.S.
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No. 02-1647

IN THE

Supreme Court of the United States

BRENDA A. GOWESKY, M.D.,

Petitioner,

v.

SINGING RIVER HOSPITAL SYSTEM,
d/b/a OCEAN SPRINGS HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Singing River Hospital System is a political subdivision of the State of Mississippi.

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REASONS FOR DENYING THE PETITION

This action was initially brought by the Petitioner in the United States District Court, Southern District of Mississippi, for alleged violations of Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act (ADA) and pendent state law claims. The Respondent's Motion for Summary Judgment was granted on March 14, 2002, and Petitioner appealed to the Fifth Circuit Court of Appeals. The appeal to the Fifth Circuit related solely to the ADA. On February 6, 2003, after oral argument, the Fifth Circuit affirmed the ruling of the District Court. No Motion to Reconsider or Petition for Hearing En Banc was filed by Petitioner.

The questions presented by the Petitioner are (1) whether it is "eminently reasonable" as a matter of federal law, to require an individual covered by the Americans With Disabilities Act to involuntarily disclose private medical information as a condition of employment when such information poses no significant health risk; (2) does the Court of Appeals' decision that it was "eminently reasonable" to require the Petitioner to disclose private medical information as a condition of continued employment contravene clearly established and fundamental rights of privacy under the circumstances, and, thus, constitute a discriminatory practice under the Americans With Disabilities Act; and (3) did the Petitioner raise a genuine issue of triable fact as to whether the Respondent engaged in a discriminatory practice under the Americans With Disabilities Act. According to Petitioner, the Fifth Circuit's opinion, if allowed to stand, would result in precedent that an employer, covered by the ADA, can demand, as a condition of employment or continued employment, that an individual disclose private information about a medical condition that has not been shown to pose a significant health risk to others.

Neither the Fifth Circuit's actual ruling, nor the record below, raise the questions presented by the Petitioner. Initially, the Fifth Circuit found as a matter of law that the Petitioner could not establish that she was regarded as disabled under the ADA and therefore any claims under the ADA for disability-based workplace harassment and/or employment discrimination fail because this threshold element was not met. (App. at 7a). The other elements of Petitioner's claims for disability-based workplace harassment and employment discrimination were addressed by the Fifth Circuit solely "[f]or the purposes of a complete analysis" . . . "assuming for the sake of argument that Gowesky could have been regarded as disabled. . . ." (App. at 7a-8a). It is these other elements which form the basis of the Petition. In making their analysis, the Fifth Circuit clearly determined, both factually and legally, that the purported "conditions of employment" form the basis of the Petitioner's workplace harassment claim under the ADA and not, as argued in the Petition, an employment discrimination claim separate from the harassment claim. Therefore, Petitioner's claim that the Fifth Circuit has created precedent that an employer can demand as a condition of employment that an individual disclose private information about a medical condition is erroneous because neither the Fifth Circuit, nor the District Court, made the analysis or reached the conclusions claimed by the Petitioner. The analysis regarding the purported conditions of employment were solely related to the question of whether those purported conditions constituted harassment under the ADA and neither court below addressed the issue as phrased by the Petitioner. To claim otherwise is a misleading statement not supported by the record. Additionally, in their analysis the Fifth Circuit did not undertake a review of the purported medical/scientific evidence submitted by the Petitioner herein because this information was not part of the record submitted to the District Court or on appeal to the Fifth Circuit.

In addition, the ruling by the Fifth Circuit is consistent with the legal principles of Rule 56 of the Federal Rules of Civil Procedure regarding summary judgment.

Lastly, the ruling by the Fifth Circuit does not have far-reaching implications as it relates to the ADA.

The Fifth Circuit's ruling was proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

On February 26, 1997, Dr. Brenda Gowesky (hereinafter, "Gowesky" or "Petitioner"), while employed as an emergency room physician at the Ocean Springs Hospital, a member of the Singing River Hospital System (hereinafter, "SRHS"), was cut by a scalpel while performing a procedure. On March 19, 1997, Gowesky received a positive test for the Hepatitis C virus. On March 20, 1997, Gowesky informed Dwight Rimes, Administrator of the Ocean Springs Hospital, that she received a positive test for Hepatitis C. After testing positive for Hepatitis C, Gowesky continued to work at the hospital. (Deposition of Gowesky, R. 162 and 167). As a result of the virus, Gowesky started a treatment regimen involving the drug Interferon. Because of the side effects of the drug therapy, Gowesky advised Dr. John Weldon, the Director of Emergency Medicine at Ocean Springs Hospital, that she could not work in the emergency department. (Deposition of Gowesky, R. 167). Pursuant to the request by Gowesky, she was taken off the emergency room schedule and began receiving a variety of benefits. (Deposition of Gowesky, R. 168).

On July 24, 1998, Gowesky applied for a continuation of medical staff privileges at the Ocean Springs Hospital. (Letter dated July 24, 1998, R. 214). In this letter, Gowesky indicated that she was "hopeful by 1999 my infection with the Hepatitis C virus will be in remission or completely cleared; this will allow me to discontinue my medications and return to work." In response to the application, the SRHS extended the staff privileges of Gowesky an additional two years. (Deposition of Gowesky, R. 172). On February 8, 1999, Gowesky contends that she spoke to Dwight Rimes about returning to work and that Dwight Rimes indicated that in order to return to work she would need a release from her doctors and would need to take a refresher course in emergency medicine. (Deposition of Gowesky, R. 174). On March 26, 1999, Gowesky wrote Dwight Rimes, confirming in part that:

> . . . In February 1999, I informed you and Dr. John Weldon, Director of Emergency Services, OSH, of my desire to resume my employment in the OSH Emergency Room in May 1999. Prior to resuming my clinical practice, I agreed to your requirements that (a) I attend an advanced trauma life support course in a continuing medical education conference; and (b) I provide you with a letter from Dr. Schiff to confirm my fitness to return to work.
>
> On Monday, March 22, 1999, an OSH Emergency Medicine Department monthly meeting was held in the hospital library. At that time, Dr. Weldon gave me my work schedule for June through August 1999; it noted the shifts I was scheduled to work in the emergency room at that time period. At the department meeting, I reminded Dr. Weldon that prior to my return to work, I needed to undergo surgery

> on my hands to correct my bilateral carpal tunnel syndrome; I discussed my need for surgery with Dr. Weldon in February 1999. Furthermore, I told Dr. Weldon, that barring any complications from my hand surgeries - I plan to resume my full time work schedule in June 1999 . . .

(Letter dated March 26, 1999, R. 215-216).

In March 1999, Gowesky was free of the Hepatitis C virus. (Deposition of Gowesky, R. 175). Gowesky had carpal tunnel surgery on her right hand on March 23, 1999, and had carpal tunnel surgery on her left hand on April 19, 1999. Despite being placed on the work schedule for June through August 1999, Gowesky was unable to report to work because of her carpal tunnel surgery. (R. 183).

On May 31, 1999, a memo was forwarded to all emergency room physicians at the Ocean Springs Hospital from Dwight Rimes informing them of the cancellation of their employment agreements effective in 90 days. This was done because the SRHS was no longer going to employ physicians in the emergency department, but rather contract with the Emergency Room Group, Ltd., who would employ their own physicians. On June 17, 1999, Gowesky wrote Dwight Rimes acknowledging the May 31, 1999 Memorandum, acknowledging that effective September 1, 1999, the Emergency Room Group, Ltd., will begin staffing the Ocean Springs Hospital Emergency Room with physicians, and advising that she had employment with the new group. (Letter dated June 17, 1999, R. 218-219).

In July 1999, Gowesky contacted Dr. John Weldon and she was placed on the work schedule beginning August 1, 1999. (Deposition of Gowesky, R. 189).

On July 29, 1999, Gowesky, by and through her attorney, advised the attorney for the SRHS handling her workers' compensation claim, that she would not return to work on August 1, 1999. This letter states in part:

> . . . this will confirm that you will advise the Ocean Springs Hospital that Dr. Gowesky will be unable to return to work on August 1, 1999. It was my understanding that some months ago Dr. Gowesky was placed on the ER schedule for the month of August. This was at a time prior to the reactivation of the virus, the request for desensitization therapy, and the issues surrounding her carpal tunnel releases. I requested that you advise the appropriate hospital staff that arrangements needed to be made to fill Dr. Gowesky's slot.

(Letter dated July 29, 1999, R. 220).

In fact, Gowesky did not report to work on August 1, 1999. (Deposition of Gowesky, R. 193).

Subsequent to Gowesky advising that she would not report to work on August 1, 1999, the SRHS never received any indication that Gowesky was ready to return to work at a later date. (Deposition of Gowesky, R. 184).

The contract with the Emergency Room Group, Ltd., anticipated in September 1999, did not occur until February 2000. As a result of the prior cancellation of the Emergency Room Physician contracts, the Ocean Springs Hospital did not have any written employment agreements with the emergency physicians to staff its emergency room as of September 1, 1999. From September 1, 1999, through October 1, 1999, the emergency

department remained staffed with physicians absent any specific employment agreements. On October 1, 1999, Professional Service Agreements were entered into between the SRHS and six former emergency room physician employees at the Ocean Springs Hospital, wherein they became independent contractors for the purpose of providing emergency medicine services. (Deposition of Rimes, R. 233; Professional Service Agreements, Exhibit "I" to Motion for Summary Judgment, filed under seal pursuant to Protective Order). Had Gowesky indicated she was ready to return to work subsequent to August 1, 1999, she would have been extended an agreement. (Deposition of Rimes, R. 235).

During the entire time Gowesky was out of work, her job was kept open for her. (Deposition of Rimes, R. 238).

Since July 1, 2000, Gowesky has been employed, without restrictions, as an emergency room physician at Gulf Coast Medical Center in Biloxi, Mississippi. (Plaintiff's Response to Interrogatory Number 22, R. 154).

I.

NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTIONS PRESENTED BY THE PETITION

A. The Petitioner Was Not Regarded As Disabled Under The Americans With Disabilities Act, Therefore All Claims Under The Act Fail

It is undisputed that the Petitioner did not assert that, as a result of her Hepatitis C infection, she was disabled in a conventional sense under the ADA. However, the ADA's

definition of disability does permit suits by those who, although not actually disabled are nonetheless "regarded as having such an impairment." 42 U.S.C. § 12102(2)(C); *Bridges v. City of Bossier*, 92 F.3d 329, 332 (5th Cir. 1996). Throughout this litigation, the Petitioner has alleged that she was regarded as disabled by her supervisors. (App. at 7a).

Accordingly, in order for the Petitioner to recover for a violation of the Americans With Disabilities Act, she must establish that although she has no impairment at all she is regarded by the employer as having a substantially limiting impairment. *McInnis v. Alamo Community College District*, 207 F.3d 276 (5th Cir. 2001).

Both the Fifth Circuit Court of Appeals and the United States District Court found as a matter of law that the Petitioner failed in her threshold burden regarding this critical element.

The Fifth Circuit held:

> Gowesky alleges that, though not disabled under subsection (a), she was "regarded as disabled" by her supervisors under subsection (c). This is evidenced, she argues, by their questions and remarks regarding her ability to return to work in the emergency room.
>
> With her assertion this court cannot agree. At most, the comments cited by Gowesky question her fitness to practice emergency room medicine, a professional calling in which routine exposure to blood and bodily fluids might allow the Hepatitis C virus to spread. The supervisors' remarks, no matter how uninformed, do not suggest Gowesky was otherwise unable to

> work as a doctor in a less-exposed or -exposing environment. The EEOC regulations make plain that an inability to perform one particular job, as opposed to a broad range of jobs, does not constitute an impairment that substantially limits one's ability to work. 29 C.F.R. §1630.2(j)(3)(i). This court has enforced the regulatory distinction. *See*, *Bridges*, 92 F.3d at 332 &n.3; *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726-28 (5th Cir. 1995).
>
> Equally detrimental to her claim is the hospital's point that Gowesky could not have been regarded as disabled by the supervisors because they kept reassigning her to the emergency room schedule. It was Gowesky who repeatedly declined to return to work. She cannot succeed on the "regarded as disabled" element of either claim when her employer never limited her job duties or hindered her return to the full range of duties.
>
> On the basis of this conclusion alone, this court concludes that Gowesky's two claims must fail.

(App. at 7a).

The District Court similarly found:

> . . . Gowesky has also not established that the hospital perceived her as disabled. A person is regarded as having a substantially limiting impairment if the individual (1) has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting

> only because of the attitudes of others towards such an impairment; or (3) has no impairment at all but is regarded by the employer as having a substantial limiting impairment. *Bridges v. City of Bossier*, 92 F.3d 329, 332 (5th Cir. 1996) (citing *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727-28 n.19 (5th Cir. 1995)). Gowesky was offered the opportunity to return to work at the hospital. *Ray v. Glidden Co.*, 85 F.3d 227, 230 (5th Cir. 1996). The hospital established that Gowesky was able to work without [sic] but Gowesky postponed that decision for unrelated surgery (Def's Summ. J. Mot., Exhs. D, G and H, p. 71). The Court finds that Gowesky has failed to establish that the hospital perceived her as disabled. Based on this evidence, the court therefore, concludes that summary judgment should be granted on Gowesky's claims under the ADA. *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996).

(App. at 29a, 30a).

The Fifth Circuit clearly found that Gowesky's claims under the Americans With Disabilities Act fail because the Petitioner was not regarded as disabled under the Act. The Fifth Circuit also made clear that its analysis of the other elements of Petitioner's workplace harassment and discrimination claims was done "[f]or the purposes of a complete analysis" . . . "assuming for the sake of argument that Gowesky could have been regarded as disabled. . . ." (App. at 7a, 8a). It is these other elements of Petitioner's ADA claims which form the basis of this Petition and not the threshold issue of whether Petitioner was regarded as disabled. Because the Fifth Circuit determined that the Petitioner was not regarded as disabled under the ADA and therefore unable

to establish the threshold element of her ADA claims, neither the record nor the decision below raise the questions presented by the Petition and review by this Court is unnecessary.

B. The Petitioner's Purported "Conditions Of Employment" Form The Basis Of The Workplace Harassment Claim Only And Do Not Form The Basis Of An Employment Discrimination Claim

The Petitioner, ignoring the Fifth Circuit's finding that she was not regarded as disabled under the ADA, contends that the purported conditions of employment placed upon her by her supervisors establish an employment discrimination claim under the ADA. However, the Fifth Circuit's opinion and the record below clearly indicate that the purported conditions of employment, including any requirement that the Petitioner inform patients and hospital staff about her successful treatment for the Hepatitis C virus, form the basis of the Petitioner's workplace harassment claim under the ADA, only, and do not form the basis of an independent employment discrimination claim.[1]

---

1. Interestingly, the purported disclosure requirement was not set forth as a basis for either Petitioner's workplace harassment claim or employment discrimination claim in Petitioner's deposition or correspondence with the Singing River Hospital System. In her deposition, Petitioner clearly identified the exact treatment she considered harassing: (1) the requirement she obtain a medical release from Dr. Eugene Schiff, a specialist in Miami, Florida, who was treating Gowesky, prior to returning to work; (2) the requirement she attend a refresher/training course on emergency medicine prior to returning to work; (3) an alleged requirement she have weekly blood draws/tests upon her return to work; and (4) alleged comments by Dwight Rimes that he did not think she could work in the emergency room with Hepatitis C and that he would not go to a

(Cont'd)

The Fifth Circuit thoroughly discussed the Petitioner's workplace harassment claim under the standards established in *Flowers v. Southern Regional Physicians Services*, 247 F.3d 229 (5th Cir. 2001). The Court reiterated the standard necessary to succeed on such a claim by finding the Petitioner must demonstrate (1) that she belonged to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of effected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action. *Id.*, at 235-236. In analyzing this claim, the Fifth Circuit discussed the factual allegations set forth by the Petitioner, including the purported condition of employment regarding notification of patients and co-workers:

> Gowesky also spoke at this time with Dr. Weldon, who allegedly imposed several conditions upon her: She must perform her work as before; she would not present the risk of infection to others; and she must inform patients and hospital staff about her successful treatment for the virus.

(Cont'd)

dentist with Hepatitis C or let her suture his child. (Deposition of Gowesky, R. 174). Only two of these items, the medical release and the refresher course, were referenced in the letter forwarded by Petitioner to Dwight Rimes on March 26, 1999, regarding her return to work and the purported conditions of that return. (R. 161-162). There was no mention in the letter about any requirement for weekly blood work and, Petitioner conceded in her deposition that this was not in the letter because Dwight Rimes withdrew that requirement. (Deposition of Gowesky, R. 176).

It is not difficult to conclude on this slender evidence that no actionable disability-based harassment occurred. The conditions that Rimes and Weldon placed on Gowesky were, given the nature of Gowesky's work, eminently reasonable. Taken as a whole, the conditions amount to three requirements: that she not present the risk of infection to employees and patients, that she be able to reassure employees and patients of her continuing non-infectious status, and that she be fully capable of resuming her duties. Moreover, even if these conditions were "unreasonable," it is unclear that an "unreasonable" return-to-work condition could raise a genuine material fact issue concerning "harassment." Gowesky has failed to present any authority, and we have located none, for the proposition that an unreasonable condition alone constitutes "harassment" under the ADA or its model, Title VII.

Nor do the alleged hurtful comments meet the high standard set in *Flowers*. We are not inclined to extend this judicially created harassment action to behavior that occurred when Gowesky was not actually working at Ocean Springs. Both of the cases that Gowesky cites address the question of harassment in the workplace. This is because a harassment claim, to be cognizable, must affect a person's working environment. With the exception of the comments regarding suturing and dentistry allegedly uttered on February 8, 1999 and anything that might have been said (no details are alleged) at the staff meeting of March 22, all of the transactions between Gowesky and her supervisors occurred via telephone or in writing. She never returned to work

> during this period. Moreover, standing on their own, the quoted supervisors' comments simply do not reach the level of severity or pervasiveness that is required to create a fact issue on a hostile work environment claim. The comments are not nearly insensitive as those in *McConathy*, much less in *Flowers*.
>
> The district court did not err in concluding, on summary judgment that Gowesky had failed to establish her prima facie case of disability-based workplace harassment.

(App. at 10a, 11a.)

In contrast, the Petitioner's claim for employment discrimination under the ADA relates to the purported failure of the Singing River Hospital System to offer the Petitioner an interim contract of employment for the period between the expiration of her contract on August 28 and the transfer of the emergency room staffing to the Emergency Room Group, Ltd. (App. at 12a). The Fifth Circuit did not address the purported conditions of employment in analyzing the employment discrimination claim because the purported conditions of employment did not form the basis of the Petitioner's employment discrimination claim. (Gowesky's Response to Interrogatories, No. 8, R. 150).

The District Court and the Fifth Circuit clearly considered the purported statement by Dr. Weldon and concluded that it was: (1) not a condition of employment; (2) not an unreasonable requirement; and (3) if it was unreasonable it did not rise to the level of harassment. It is misleading, if not a false statement, to suggest that the District Court or Fifth Circuit has adopted a rule of disclosure proposed by Petitioner. Petitioner's statement that "the condition unreasonably forced Gowesky to choose

between her livelihood or her privacy" (Petition, page 14) is unsupported by the record and is inconsistent with the claims originally set forth by the Petitioner.

C. The Petitioner Presented No Medical/Scientific Evidence Until This Petition

The Petitioner asserts that the decision by the Fifth Circuit concerning the rights of employees with Hepatitis C conflicts with the reasonable medical judgment of public and private health experts "including the Centers for Disease Control (CDC), the National Institute of Health (NIH), the American Medical Association (AMA), the American College of Emergency Physicians (ACEP), the Society for Healthcare Epidemiology of America (SHEA), and the American College of Surgeons." (Petition, page 5). In making this assertion, the Petitioner sets forth a variety of statistical information regarding Hepatitis C. Importantly, the Petitioner does not cite to any portion of the Fifth Circuit opinion or the District Court opinion wherein this medical/scientific evidence was purportedly discussed because the Petitioner did not present this purported information to either the District Court or on appeal to the Fifth Circuit. Therefore, the Petitioner's assertion that the Fifth Circuit opinion is in conflict with this Court's decisions in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1986) and *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998) is unsupported by the record below and is not a proper subject for this Court's review. It is well-established practice that the Court will "decide cases on the grounds raised and considered in the Court of Appeals and included in the question" on which certiorari was granted. *Bragdon* at 638.

II.

THE ENTRY OF SUMMARY JUDGMENT BY THE DISTRICT COURT AND THE FIFTH CIRCUIT AFFIRMING OF SUMMARY JUDGMENT WERE APPROPRIATE UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Petitioner discusses at length purported factual inaccuracies and inconsistencies by the courts below in an attempt to establish a deviation from the principals of Rule 56 of the Federal Rules of Civil Procedure. The Fifth Circuit set out the well-established standard for summary judgment and utilized the same in its review of the proceedings:

> We review *de novo* a district court's grant of summary judgment, applying the same standard as the district court. *See*, *Walker v. Thompson*, 214 F.3d 615, 624 (5th Cir. 2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986). "If the moving party meets the initial burden of showing there is no genuine issue of material fact the burden shifts to the non moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Allen v. Rapides Parish Sch. Bd.*, 204 F.3d 619, 621 (5th Cir. 2000) (internal quotations and citation omitted). Doubts are to be resolved in favor of the

> non-moving party, and any reasonable inferences are to be drawn in favor of that party. *See, Burch v. City of Nacogdoches*, 174 F.3d 615, 619 (5th Cir. 1999).

(App. at 5a).

Despite Petitioner's contentions, it is clear from the opinions of the Fifth Circuit and District Court that a thorough factual analysis of the record was completed and Petitioner's attempt to now supplement the record with unsupported claims in this Petition does nothing to modify the record in the courts below and before this Court. Both the District Court and the Fifth Circuit set forth a detailed factual analysis and considered any factual discrepancies in light of the Petitioner consistent with Rule 56. Applying the facts as presented in the record to the applicable law, the courts below found that summary judgment was appropriate based on the specific claims asserted by Petitioner.

III.

THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS UNDER THE ADA

The Petitioner contends that:

> If allowed to stand, the Court of Appeals' decision results in precedent, at least in the Fifth Circuit, that an employer, covered by the ADA, can demand, as a condition of employment or continued employment, that an individual disclose private information about a medical condition that has not been shown to pose a significant health risk to others.

(Petition, page 9).

In her conclusion, the Petitioner further states:

> Unless the writ is granted in this case, and the decision below vacated, there will exist a legal guideline that conflicts with informed medical judgment.

(Petition, page 20).

As set forth herein, these conclusions by Petitioner are erroneous. The purported conditions of employment, specifically any requirement that the Petitioner inform patients and hospital staff about her successful treatment for the Hepatitis C virus, form the basis of the Petitioner's workplace harassment claim under the ADA, only, and do not form the basis of an independent employment discrimination claim as now contended in the Petition. Neither the Fifth Circuit nor the District Court made the analysis or reached the conclusions claimed by the Petitioner. The analysis regarding the purported conditions of employment were solely related to the question of whether those purported conditions constituted harassment under the ADA and neither court below addressed the issue as phrased by the Petitioner. To claim otherwise is a misleading statement not supported by the record. Both courts below clearly considered the purported disclosure requirement under the parameters of the workplace harassment claim and it is misleading, if not a false statement, to suggest that either court adopt a rule of disclosure as proposed by Petitioner.

The medical/scientific evidence set forth in the Petition was not presented to either the District Court or to the Fifth Circuit and therefore the opinion of the Fifth Circuit does not conflict with "informed medical judgment" as alleged in the Petition.

The Fifth Circuit Court of Appeals, as well as the District Court, found that the Plaintiff was not regarded as disabled under the ADA and therefore the threshold element of all of the ADA claims was not met by Petitioner. Any further discussion regarding the other elements of her ADA claims was done for the stated "purpose of a complete analysis" . . . "assuming for the sake of argument that Gowesky could have been regarded as disabled. . . ." (App. at 7a-8a). The Fifth Circuit ruled, clearly and simply, that the Petitioner was not regarded as disabled under the ADA and this ruling constituted the proper application of the law based on the facts before the Court. This case raises no significant issue of law under the ADA and does not have far-reaching implications.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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